

BRADY HENRY

IBLA 94-783

Decided January 9, 1998

Appeal from a Decision of the Alaska State Office, Bureau of Land Management, denying reinstatement of Native Allotment Application. F-14425.

Set aside and referred for hearing.

1. Administrative Authority: Generally--Administrative Procedure: Adjudication--Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments

When it is determined that a Native allotment application must be rejected as a matter of law, assuming the truth of relevant matters set forth in support of the application, it may be rejected without a hearing.

2. Administrative Authority: Generally--Administrative Procedure: Adjudication--Alaska: Native Allotments

An evidentiary hearing is properly ordered when a case on appeal discloses an issue of fact which is material to the case that can be resolved only by introduction of evidence not found in the record before the Board.

APPEARANCES: Andrew R. Harrington, Esq., Alaska Legal Services Corporation, Fairbanks, Alaska, for Appellant; Regina L. Sleater, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE PRICE

Brady Henry has appealed from the July 5, 1994, Decision of the Alaska State Office, Bureau of Land Management (BLM), denying reinstatement of his Native Allotment Application, F-14425.

On or about October 27, 1971, the Bureau of Indian Affairs (BIA) filed Native Allotment Application F-14425 with BLM on Appellant's behalf. ^{1/} The application described 160 acres of unsurveyed land identified as parcels A, B, and C. ^{2/} According to that Native Allotment Application, Henry asserted qualifying use and occupancy commencing in July 1969. On August 23, 1972, BLM issued a Decision rejecting the application on the ground that none of the land described was open to entry in July 1969. Specifically, the Decision stated that parcel A was included in State Selection Application F-027787, filed on May 25, 1961, by the State of Alaska (the State); that patent No. 1234212 included parcel B and was issued to the State on November 20, 1963; and that parcel C was included in State Selection Application F-027782, also filed on May 25, 1961. Additionally, the Decision noted that Public Land Order No. 4582 dated January 17, 1969, withdrew all unreserved land from appropriation and disposition under public land law, except the location of metalliferous minerals, for the protection of Alaska Natives. The Decision was received by Henry on August 29, 1972. He did not appeal, and on December 12, 1972, the case was closed.

On December 2, 1980, Congress enacted the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634 (1994). Section 905(a) of ANILCA provided that Native allotment applications that were pending before the Department of the Interior on December 18, 1971, and which described either land that was unreserved on December 13, 1968, or land within the National Petroleum Reserve, were deemed legislatively approved, unless certain circumstances were presented, one of which was the filing of a protest by the State.

By letter dated May 7, 1981, the State notified BLM that it was protesting the claims of a number of Native allotment applicants, including Henry's. Copies of the State of Alaska Protest Forms for each parcel described in Henry's Native Allotment Application, each of which was dated June 1, 1981, show that the State claimed an interest in an existing trail as a public access route and that the parcels constituted the only reasonable access to publicly-owned resources. On October 16, 1981, however,

^{1/} The application was filed pursuant to the Act of May 17, 1906 (the Native Allotment Act), as amended, formerly codified as 43 U.S.C. §§ 270-1 through 270-3 (1970). The Native Allotment Act was repealed effective Dec. 18, 1971, by § 18(a) of the Alaska Native Claims Settlement Act, subject to a savings clause, 43 U.S.C. § 1617(a) (1994).

^{2/} As described in the application, parcel A contained approximately 80 acres and was located in sec. 21, T. 19 N., R. 12 E., Copper River Meridian (CRM). Parcel B contained approximately 40 acres and was located in sec. 22, T. 18 N., R. 11 E., CRM. Parcel C contained approximately 40 acres and was located in secs. 13, 14, 23, and 24, T. 19 N., R. 10 E., CRM.

the State withdrew its protest to certain applications, including Henry's, because it was among those listed in exhibit A to the State's notification "noted by the BLM as properly closed." In addition, the State withdrew its protest as it related to applications that had been approved, (Ex. B), or applications that could not be legislatively approved because they described lands in National Park units, (Ex. C). The letter further stated that "if the BLM information upon which this withdrawal decision is based proves to be wrong, the state reserves the right to reactivate affected protests."

On November 27, 1981, BLM issued a Decision that in part summarily dismissed the State's protest as to applications identified in an appendix to that Decision that was not attached and does not otherwise appear in the record. We assume that the appendix consisted of at least exhibit A to the State's withdrawal of its protest on October 16, 1981.

By memorandum dated December 7, 1988, from the allotment specialist with the Tanana Chiefs Conference, Inc. (TCCI), ^{3/} a copy of Appellant's Native Allotment Application was transmitted to the BLM Chief of Doyon Branch Adjudication:

The allotment application for Brady Henry on file with BLM has a use and occupancy date beginning on July, 1969. [sic] As shown on the enclosed copy of Brady Henry's application, he claimed use and occupancy began in June, 1955. We have the original application on file.

On August 23, 1972 this case file was rejected. Based on the enclosed application[,] I believe this case file should be reinstated.

The record contains two Native Allotment Applications, both apparently signed by Henry on December 7, 1970. One application bears the full signature of Katherine L. Adams, Acting Realty Officer, BIA, the other bears only her initials, and both are dated October 26, 1971, in the same handwriting. In signing and initialing, Adams certified Henry's status as a Native; his use, occupancy, marking, and posting of the land claimed; and that his claim did not infringe on the claims of other individuals or on areas of Native communal use. The typed land descriptions of the three parcels in both Native Allotment Applications appear to be identical, and typographical errors in both have been corrected manually. A handwritten notation further describing the situs of parcel A appears on both applications. ^{4/} Evidently only the application with the 1969 date was

^{3/} According to BLM, TCCI was a BIA contractor. (Answer at 3.)

^{4/} The Native Allotment Application that claims use and occupancy commencing in July 1969 bears the following notation with respect to parcel A: "80 acres up Tanana River east of Tanana village in section 21." The application asserting use and occupancy beginning in June 1955 bears the handwritten notation "40 acres south of Marsfield Lake in Section 13."

transmitted, and BLM acknowledges receipt of the application on October 27, 1971. No explanation for Adams' action in accepting the conflicting applications is provided in, or suggested by, the record.

By memorandum to BLM dated October 11, 1990, TCCI transmitted Henry's affidavit, executed on October 10, 1990, in which he attested to use and occupancy of the land since he was 14 or 15 years old, which appears to validate the 1955 date of the second application. He did not attempt to explain the existence of the two Native Allotment Applications, however. On June 24, 1994, TCCI inquired as to the status of its October 1990 memorandum and requested a field examination. On June 30, 1994, BLM advised TCCI that "reinstatement of [Henry's] application is improper. Therefore, a field examination will not be required." That conclusion was confirmed in the July 5, 1994, Decision from which this appeal was taken.

The Decision recited the facts of the two Native Allotment Applications as described above, and observed that neither Henry nor TCCI explained the circumstances attending the submission thereof. Noting that the Native Allotment Application received in 1971, to which the August 23, 1972, Decision pertains, on its face revealed that use and occupancy commenced after the land had been closed to entry, BLM concluded that Henry's failure to appeal the decision and the doctrine of administrative finality precluded reconsideration. Citing Lloyd D. Hayes, 108 IBLA 189 (1989) and Turner Brothers Inc. v. Office of Surface Mining Reclamation and Enforcement, 102 IBLA 111 (1988), BLM further concluded:

Since the application was rejected by [sic] a matter of law and neither the applicant or TCC[I] has provided the BLM with any compelling legal or equitable reasons to reinstate the application, especially since the applicant waited approximately 16 years after the decision became final to try to correct the use and occupancy date, the request for reinstatement of Native allotment application F-14425 must be denied. See Franklin Silas, 117 IBLA 358 (1991), and Franklin Silas (On Judicial Remand), 129 IBLA 15 (1994).

(Decision at 2-3.)

This appeal timely followed, and by Order dated December 1, 1994, the Board stayed the effect of the July 1994 Decision.

In his Statement of Reasons (SOR), Henry advances several arguments in support of reinstatement of his Native Allotment Application: the stipulated procedures resulting from Aguilar v. United States, 474 F. Supp. 340, 342 (D. Alaska 1979), require a hearing before his application can be rejected; neither the Franklin Silas decisions, *supra*, nor Aguilar, *supra*, support rejection on the basis of administrative finality; he is entitled to a hearing pursuant to Pence v. Morton, 391 F. Supp. 1021 (D. Alaska 1975); and section 905 of ANILCA requires reinstatement and adjudication of the application.

Aguilar v. United States, *supra*, involved Native allotment applications that conflicted with land conveyed to the State of Alaska. In settlement of the litigation, the Department adopted stipulated procedures, the use of which "has been extended to all types of conveyed land." Aguilar and Title Recovery Handbook for Native Allotments (Handbook) at 2.

The stipulated procedures set forth in the Handbook specify the manner in which conflicting interests in the lands conveyed out of Federal ownership are to be adjudicated, including the nature and effect of such proceedings on patented lands. See Aguilar Stipulation Nos. 3, 6; see also Handbook at 11.

Pence v. Kleppe, *supra*, establishes the principle that before rejecting a Native allotment application, procedural due process requires BLM to afford the applicant notice and an opportunity for a hearing on a disputed issue of fact. In such cases, even when the applicant receives notice of the rejection and fails to act, as Henry did, reinstatement is required because lack of compliance with Pence vitiates the administrative finality that otherwise attends the rejection. Forest Service, U.S. Department of Agriculture (Heirs of Archie Lawrence), 128 IBLA 393, 396 (1994); Heirs of George Titus, 124 IBLA 1, 4 (1992).

Our decision in Franklin Silas, 117 IBLA 358 (1991), *aff'd Silas v. Babbitt*, 96 F.3d 355 (9th Cir. 1996), holds that unless an appellant comes forward with sufficient evidence of a "significant error on the face of the original application," no Pence hearing is required "if the initial BLM determination was based on the applicant's own declaration of material facts, and those facts demonstrate conclusively that the application must be rejected as a matter of law." Franklin Silas, *supra*, at 366.

It is clear from BLM's Answer that there is no dispute between the parties regarding the sequence of events or the existence of the second Native Allotment Application. Instead, BLM maintains that it correctly applied the law and decisions of the Board in determining that reinstatement was not available because of the doctrine of administrative finality. In addition, it is argued that neither Aguilar nor Pence applies to the circumstances of this appeal, because the Native Allotment Application submitted in 1971 on its face revealed a defect that was fatal as a matter of law. Not unreasonably, BLM thus frames the issue on appeal exclusively in terms of whether it was correct to refuse reinstatement based solely on the first Native Allotment Application it received, when Henry did not appeal and did not question the application until 16 years after it was rejected. (Answer at 5.)

[1] As we have said, the general rule is that "when it is determined that an application must be rejected as a matter of law, assuming the truth of relevant matters set forth in support of the application, the application may be rejected without a hearing." (Citations omitted.) Boy Dexter Ogle, 140 IBLA 362, 372 (1997). See also Akootchook v. United States Department of the Interior, 747 F.2d 1316, 1320 (9th Cir. 1984); Carmel J. McIntyre (On Reconsideration), 67 IBLA 317, 322 (1982). The matter does

not end here, however, because in his affidavit Henry asserts that his use and occupancy commenced in 1955, and thus he tacitly contends that the second and not the first Native Allotment Application is his application, a disputed issue of fact that requires a hearing. The record contains nothing that would reliably permit us to judge the merits of the parties' claims. It may be that Henry completed more than one application because he claimed land in three parcels, as BLM hypothesizes, and that the second application therefore was transmitted to, or collected by, TCCI through mistake or inadvertence. It is possible that BIA erroneously described all three parcels in a single application or that Henry simply made a mistake in completing the application form and attempted to correct it by completing the second application, with the belief and expectation that it would be filed with BLM by BIA. Many explanations are possible, but it is Henry's burden to prove by a preponderance of the evidence that the second Native Allotment Application is the application that he intended to file in 1971.

[2] Because of the nature and circumstances of the evidence presented by Henry, the fact that the second application did not surface until years after the August 23, 1972, Decision is not dispositive. "An evidentiary hearing is properly ordered when a case on appeal discloses an issue of fact which is material to the case that can be resolved only by introduction of evidence not found in the record before the Board." Boy Dexter Ogle, supra, at 371. Administrative finality thus does not preclude a hearing in this case.

Accordingly, this matter is referred to the Hearings Division for a hearing before an administrative law judge who shall make findings of fact and issue a decision determining which Native Allotment Application is the application Henry intended to file in 1971, following which the case shall be remanded to BLM for further appropriate action.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is set aside and this matter is referred to the Hearings Division for assignment to an administrative law judge for a hearing in accordance with this opinion.

T. Britt Price
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge